ORIGINAL

BLUMENFELD & COHEN
SUITE 300
1625 MASSACHUSETTS AVENUE, NW
WASHINGTON, DC 20036

202.955.6300
FACSIMILE 202.955.6460

http://www.technologylaw.com

SUITE 1170
4 EMBARCADERO CENTER
SAN FRANCISCO, CA 94111
415.394.7500
FACSIMILE 415.394.7505

EX PARTE OR LATE FILED

RECEIVED
OCT 27 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

October 27, 1999

Lawrence E. Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room 5-C450
Washington, D.C. 20554

Re: *Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147*

Dear Mr. Strickling:

On behalf of Rhythms NetConnections Inc. and its subsidiary Rhythms Links Inc. ("Rhythms") we are writing to urge the Commission to adopt cost-based TELRIC pricing for line sharing in its upcoming Order in this docket.

Rhythms in large part agrees with other data CLECs regarding the legal basis for mandating line sharing and the means of implementing line sharing. This letter specifically addresses, in addition, the principles that should govern cost-based pricing of line sharing in a competitive, post-1996 Act environment. The 1996 Act provides clear rules to govern line sharing pricing, which authorize definitive Commission action to ensure the speedy, efficient and nondiscriminatory implementation of line sharing.

There can be no question that line sharing is in the public interest. A federal line sharing mandate will greatly facilitate the deployment of advanced services by relieving CLECs of the burden of obtaining stand-alone copper loops for providing xDSL-based services. Equally important as the ability to share loops, however, is the price CLECs pay for this functionality. A significant potential remains for an anticompetitive price squeeze if the charge for line sharing is inflated above its cost. In order to ensure that CLECs can provide service at competitive rates, the Commission should provide clear, specific guidelines for the determination of the price of line sharing.

No. of Copies rec'd 0+1
List ABCDE

The Commission Should Declare That Line Sharing Is a UNE

Line sharing unquestionably meets the definition of a UNE under the 1996 Act. Providing the ability of transmitting telecommunications over a copper loop, line sharing is patently a feature, capability or functionality of a network facility according to the definition of "network element." 47 U.S.C. 153(45). In addition, as Rhythms and other carriers amply demonstrated in their comments in this proceeding,[1] line sharing meets the unbundling test of Section 252.[2] Line sharing is necessary to the provision of competitive telecommunications services because it is the only economically feasible means of providing high-speed data services in the residential market. In addition, the inability to perform line sharing significantly impairs CLECs' ability to provide xDSL-based services, due to the significant time delays faced in obtaining ILEC stand-alone copper loops and the ever-decreasing amount of copper loop plant that remains available in the network.[3] Finally, the ILECs routinely market and sell their DSL services on the basis that they are better, less expensive, and more convenient than competitors' service due to the fact that ILEC DSL is provisioned on the customer's existing voice loop and that only ILECs can offer this combined service.

The 1996 Act Requires That Line Sharing Be Priced According to TELRIC Principles

Section 251 of the 1996 Act requires that the prices for unbundled network elements and interconnection to the network "shall be based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable)."[4] In order to implement this mandate, the Commission adopted Total Element Long Run Incremental Costs ("TELRIC") principles for determining the prices of UNEs.[5] The Commission's TELRIC principles require that "incumbent LECs' prices for interconnection and unbundled network elements shall recover the forward-looking costs directly attributable to the specified element, as well as a reasonable allocation of forward-looking common costs."[6]

TELRIC is the law of the land. The Supreme Court upheld the FCC's jurisdiction to promulgate federal pricing rules in *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721, 851 (1999). Subsequent to this decision, the Eighth Circuit reinstated TELRIC rules on the merits in an Order released June 10, 1999.[7] Therefore, TELRIC principles must govern the pricing of line sharing as a UNE.

---

[1] *E.g.*, Rhythms Comments at 4-5; Covad Comments at 19; NorthPoint Comments at 26; @Link Comments at 5 n.9; ALTS Comments at 11; NAS Comments at 9.

[2] 47 U.S.C. 252(d)(1).

[3] "SBC To Upgrade Internet Access," October 16, 1999; "Expanding Network US West Will Fill KeyRole As Qwest Expands Reach," Omaha World-Herald (July 20, 1999); "Bell Atlantic Fiber-Optic Network Passes Five Millioon Mile Mark; Leads Nations," Mar. 30, 1999 <www.ba.com/nr/1999/mar/1990330003.html>.

[4] 47 U.S.C. § 251(d)(1).

[5] 47 C.F.R. §§ 51.501-51.515.

[6] *First Report and Order*, 11 FCC Rcd. at 15,847 ¶ 682.

[7] *Iowa Utils. Bd. v. FCC*, Cases 96-3321 et al., Order (8th Cir. June 10, 1999).

Thus, the starting point of figuring TELRIC prices remains the ILECs' incremental costs of providing that UNE. According to the ILECs' approved federal DSL retail service tariffs, the incremental cost of adding DSL service to an existing voice loop is zero.[8] These tariffs demonstrate that there is no additional loop costs in adding DSL service to a loop. Thus, TELRIC principles dictate that the price of permitting a CLEC to use an existing voice loop is also zero. The Commission can in fact make this determination without any independent analysis; the ILECs have already determined the rate by submitting DSL cost studies.

Rhythms disagrees with Covad's suggestion that the Commission adopt an interim line sharing pricing guideline of 10 percent of the voice-grade loop rate.[9] The 10-percent figure that Covad offers has no basis in TELRIC principles and is likely presented as a defense to the ILECs' "free rider" arguments. The ILECs' free rider argument is baseless, most notably for the fact that, as we discuss below, the ILECs have declared that there are no additional loop costs associated with line sharing. Thus, neither the ILEC's DSL service nor the CLEC's DSL service is a free rider on the copper loop. Moreover, Rhythms is unwilling to support any price guideline for line sharing that does not comport or is not grounded in the statutory pricing standards of the 1996 Act.

Even if the ILEC cost studies are not in themselves sufficient for determining the proper line sharing rate, further TELRIC analysis will achieve the same result. TELRIC principles require, as the above-quoted portion of the *First Report and Order* indicates, that proper cost-based pricing of UNEs requires that the operation of provisioning an element be reduced into its component parts with as great a degree of specificity and granularity as possible. The provisioning of xDSL-capable loop UNEs typically involves the pre-ordering and ordering stages, delivery, testing and maintenance. The cost of each of these stages of provisioning must be priced out at forward-looking, incremental rates.

The pre-ordering and ordering stages of loop provisioning are performed, or should be performed in a competitive environment,[10] by Operations Support Systems. In the case of line sharing, the ILECs have already developed OSS interfaces capable of recording and tracking loops that are shared among voice and DSL services.[11] According to the MTG group of consultants, which filed an ex parte declaration in this proceeding, these interfaces can be

---

[8] Bell Atlantic Telephone Co., Tariff F.C.C. No. 1, Transmittal No. 1076 (Sept. 1, 1998); GTE Systems Telephone Companies, Tariff F.C.C. No. 1, GSTC Transmittal No. 260 (Aug. 28, 1998); Pacific Bell Telephone Co., Tariff F.C.C. No. 128, Transmittal No. 1986 (June 15, 1998).

[9] Letter from Jason Oxman, Covad Communications, to Magalie R. Salas, FCC, at 3 (Sept. 23, 1999); Letter from Thomas Koutsky and Jason Oxman, Covad Communications, to Lawrence E. Strickling at 4 (Sept. 30, 1999); Covad Communications Notice of Ex Parte Communication at 2 (Oct. 5, 1999).

[10] *Application of BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket 98-121, Memorandum Opinion and Order, FCC 98-271 ¶¶ 84-86 (rel. Oct. 13, 1998); *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298 ¶¶ 133-138 (rel. Aug. 19, 1997).

[11] US West, for example, is rapidly developing interfaces for its own retail DSL operations. FCC Line Sharing Forum, August 31, 1999.

modified for high-volume competitive use within 12 months.[12] As has already been informally agreed within the DSL industry, data CLECs will contribute to the development and maintenance of these interfaces via some rational payment mechanism. Thus, ILECs will be reimbursed for use of the OSS interfaces required for line sharing by the CLECs that use them. No further pass-through of these costs is necessary or permitted under the Commission's TELRIC pricing regime.

The "delivery" of the line sharing UNE requires very little actual ILEC effort. By definition, the loop will have already been installed to the customer's premises. In order for the CLEC to provide competitive DSL services over that loop, a cross connect to the CLEC's DSLAM must be performed. CLECs routinely pay cross-connect charges under the present stand-alone loop environment for the same purpose. This same charge can simply continue to be applied to CLECs on a line-item basis under a line sharing environment, requiring no allocation of cost to the use of the shared loop. Indeed, TELRIC prohibits such indirect cost allocation if ILECs can recover cross-connect costs through a more specific charge.

The Commission's determination regarding the price of line sharing is thus firmly grounded in the requirements of the 1996 Act as well as the ILECs' own conclusions on the loop cost associated with line sharing. On the basis of this precedent, the Commission should determine that there can be no loop charges assessed for provisioning line sharing.

Principles of Nondiscrimination Also Govern the Pricing of Line Sharing

As several CLECs have argued in this proceeding, in addition to the cost-based pricing mandate, Section 252 also includes the requirement that all pricing be nondiscriminatory. The requirement of nondiscriminatory pricing requires that CLECs pay exactly the charges for obtaining UNEs as the ILEC itself pays for the same elements.[13] In the context of line sharing, nondiscrimination requires that CLECs pay exactly what the ILEC pays for use of an existing voice loop. As discussed above, the ILECs that provide DSL services have publicly stated that they incur no costs, and thus pay nothing, in order to transmit DSL-based services over a voice loop. The 1996 Act requires that CLECs receive the same treatment.

This analysis of course rests squarely on the ILECs' earlier cost studies submitted last fall in support of their federal DSL retail tariffs. The ILECs may attempt amend these cost studies to reflect a different "cost" of using a shared loop. According to TELRIC principles, however, the price of shared loops cannot be figured on the basis of what is allocated to a shared loop, but only to the demonstrable incremental cost of a shared loop. If the ILECs amend their cost studies to indicate that they now allocate to their DSL retail services some new cost to using shared loops, that amendment should not "raise" the price of line sharing for CLECs.

---

[12] CC Docket No. 98-147, Statement of Dr. Dennis J. Austin at 4-5 (Sept. 30, 1999).

[13] "Adopting a pricing methodology based on forward-looking, economic cost best replicates, to the extent possible, the conditions of a competitive market. In addition, a forward-looking cost methodology reduces the ability of an incumbent LEC to engage in anti-competitive behavior." *First Report and Order*, 11 FCC Rcd. at 15,846 ¶ 679.

Similarly, if the ILECs now amend their cost studies to indicate a new incremental cost of using a shared loop, such amendment should be met with extreme skepticism by the Commission. If the ILECs attempt to "raise" the incremental cost of using shared loops by submitting new cost studies "discovering" additional "costs" in the wake of a Commission line sharing mandate, such action would be blatantly anticompetitive and should create considerable doubt in the Commission's mind as to whether an ILEC is fit for Section 271 approval. Moreover, the Commission reserves the right to investigate all cost study amendments to review their validity. This authority may become of crucial importance for purposes of ensuring the nondiscriminatory implementation of line sharing.

The Commission Should Require ILECs to Implement Line Sharing in Federal Tariffs

Rhythms departs from NorthPoint in that Rhythms strongly believes that the appropriate means of implementing line sharing remains a federal line sharing tariff requirement rather than amendments to individual interconnection agreements.[14] A federal tariff would immediately provide uniformity of deployment throughout each ILEC's region. In addition, the Commission would retain jurisdiction to review and amend these interstate tariffs,[15] which would provide oversight for line sharing in one forum. This centralization of review will ensure that line sharing is implemented according to the Commission's guidelines in as efficient a manner as possible. Having already determined that DSL services are inherently interstate and properly within federal jurisdiction,[16] the Commission plainly has authority to direct that line sharing be implemented on a federal basis

Rhythms and Covad agree that Title II of the 1996 Act and the Commission's *Expanded Interconnection Orders* authorize the Commission to require federal tariffing of line sharing.[17] The so-called "necessary and proper clause" of Section 251 of the 1996 Act empowers the Commission to "complete all actions necessary to establish regulations to implement the requirements of the section."[18] According to the Supreme Court, Section 251 "means what it says: the FCC has rulemaking authority to carry out the 'provisions of the Act,' which includes §§ 251 and 252."[19] This authority certainly supports federal tariffing requirement for the advancement of residential DSL competition.

[14] CC Docket No. 98-147, Letter of Ruth Milkman to Larry Strickling, Chief, Common Carrier Bureau at (Oct. 5, 1999); Letter of Ruth Milkman to Larry Strickling, Chief, Common Carrier Bureau at 3 (Oct. 22, 1999); Letter of Thomas Koutsky, Covad Communications, to Lawrence E. Strickling, Chief, Common Carrier Bureau, at 2-3 (Sept. 30, 1999).

[15] "We have ample authority under the Act to conduct an investigation to determine whether rates for DSL services are just and reasonable." *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket 98-79, Memorandum Opinion and Order, 13 FCC Rcd. 22,466 at 22,483 ¶ 32 (1998). recon. FCC 99-41 (rel Feb. 26, 1999) ("*GTE DSL Order*") (citing 47 U.S.C. §§ 204-05).

[16] *GTE DSL Order*, 13 FCC Rcd. at 22,474 ¶ 16.

[17] Letter of Jason Oxman, Covad Communications, to Lawrence E. Strickling, Chief, Common Carrier Bureau, at 1-2 (Sept. 30, 1999).

[18] 47 U.S.C. § 251(d)(1).

[19] *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 730 (1999).

Even absent the 1996 Act, the Commission retains authority to mandate federal tariffing under Section 201 of the 1934 Act,[20] which was the legal basis for its *Expanded Interconnection* decisions.[21] The *Expanded Interconnection* decisions included a federal tariffing requirement in order to implement a collocation regime for the promotion of telecommunications competition.[22] This decision was not limited or abrogated by the subsequent appeal of these orders in the *Bell Atlantic* case.[23] The D.C. Circuit did not challenge the Commission's authority to impose this tariffing requirement.[24] Rather, that decision, in which the court construed the 1934 Act narrowly to avoid a potential constitutional issue, rested solely on the court's finding that "the [1934] Act does not expressly authorize an order of physical co-location [*sic*], and thus the Commission may not impose it."[25] This holding has no bearing on the Commission's clear authority to mandate line sharing or a federal tariffing requirement under Section 251 of the 1996 Act.

Rhythms, along with Covad,[26] supports a federal tariffing requirement in order to ensure the uniform, swift, and nondiscriminatory implementation of line sharing with opportunity for immediate Commission review and enforcement. Implementing line sharing via amendments to individual CLEC interconnection agreements would fail to provide any of these benefits. As Rhythms' unhappy experience with the *Advanced Services Order*[27] demonstrates, negotiations with ILECs for the implementation of federal rules inevitably results in significant CLEC concessions that counteract any benefit that such law was intended to produce. The process of amending interconnection agreements is arduous, of uncertain outcome, and rarely yields the Commission's intended result. Indeed, Rhythms remains unable, after six months of negotiations, to obtain reasonable collocation terms in its BellSouth interconnection agreement.

The *Advanced Services Order* is a powerful example for demonstrating the necessity of requiring federal tariffing for line sharing. The broad-reaching collocation rules issued in the *Advanced Services Order* have not seen any meaningful change in ILEC collocation provisioning. State Commissions continue to grapple with implementing the Commission's rules and ILECs continue to refuse to provide innovative collocation arrangements at reasonable prices and in efficient intervals. Rhythms encourages the Commission to take a role in implementing line sharing in order to avoid a similar result.

---

[20] 47 U.S.C. § 201.

[21] *Expanded Interconnection with Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd. 7369, 7410 (1993), Second Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd. 7341 (1993), *rev'd in part on other grounds, Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) ("*Expanded Interconnection Orders*").

[22] 7 FCC Rcd. at 7372; 8 FCC Rcd. at 7377.

[23] *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

[24] *See* 23 F. 3d at 1448.

[25] 24 F.3d at 1447.

[26] Letter of Jason Oxman, Covad Communications, to Lawrence E. Strickling, Chief, Common Carrier Bureau, at 1-2 (Sept. 30, 1999).

[27] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, FCC 99-48 (rel. Mar. 31, 1999) ("*Advanced Services Order*").

Conclusion

Rhythms therefore urges the Commission to hold that line sharing is a UNE subject to cost-based TELRIC pricing rules and to require ILECs providing DSL services to file federal line sharing tariffs within 30 days of the effective date of the forthcoming Order in this docket.

Sincerely,

Glenn B. Manishin
Christy C. Kunin
Stephanie A. Joyce
Blumenfeld & Cohen – Technology Law Group
1625 Massachusetts Ave., N.W., Suite 300
Washington, D.C. 20036
202.955.6300
202.955.6460 fax

Jeffrey Blumenfeld
Chief Legal Officer, General Counsel
Rhythms NetConnections Inc.
6933 South Revere Parkway
Englewood, CO 80112
303.476.4200

Attorneys for Rhythms NetConnections Inc.

cc: Magalie R. Salas , Secretary, Federal Communications Commission
Staci Pies, Federal Communications Commission
Donald Stockdale, Federal Communications Commission